84-1674

No.

Office-Supreme Court, U.S.
FILED
APR 22 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOEL D. ENDER,

Petitioner,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: APRIL 22, 1985

The Scheffer Press, Inc.—(312) 263-6850

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I

Should the Supreme Court uphold the lower court's grant of summary judgment on the pleadings to the defendants as to the entire complaint where the lower court has ignored the existence of and has refused without any stated legal ground to allow plaintiff to proceed to trial on the following independent, specifically pleaded, legally sufficient, timely filed claims:

(a) the "Lawsuit Bar Provision" claims, which allege that the defendant employer and union have deprived plaintiff employee and plaintiff class of civil rights, have committed common law fraud, and have violated LMRDA, 29 U.S.C. Secs. 411-415 by use of the "Lawsuit Bar Provision" in the UAW-Chrysler collective bargaining contract, which provision absolutely prohibits plaintiff employees from exercising their civil rights to sue the employer under LMRA, 29 U.S.C. Sec. 185 for breach of the employees' contract rights;

(b) the "4-month proviso" claims, which allege that the defendant union, in its constitution and in its practices, has continually violated the "4-month proviso" of LMRDA, 29 U.S.C. Sec. 411(a)(4) by insisting that union members must exhaust intra-union procedures for an unlimited time beyond four months before filing any suit;

(c) the "LMRDA Sec. 415 notice duty" claims, which allege that the defendant union has continually violated its LMRDA Sec. 415 duty to inform its members, including plaintiff, of the provisions of LMRDA Secs. 411-415?

QUESTION II

Should the 6-month limitation period applied by the lower court to bar plaintiff's LMRA Sec. 185 claims for employer breach of contract/union unfair representation of grievance have been tolled upon the equitable grounds established by the independent claims listed in Question I, to wit: that the defendant employer and union deprived plaintiff of his civil right to sue under LMRA Sec. 185 and defrauded him as to that right by use of the "Lawsuit Bar Provision", which absolutely prohibits plaintiff from filing a LMRA Sec. 185 suit, and that the union also violated its specific LMRDA Sec. 415 statutory duty to inform plaintiff of the provisions of LMRDA Sec. 411(a)(4) to the effect that the union cannot absolutely limit his right to sue the union or any other party?

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REPORTS OF OPINIONS BELOW

None of the opinions below were published in the official or unofficial reports.

JURISDICTION OF THE SUPREME COURT

The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and Supreme Court Rule 17.

This petition is filed within ninety days of January 21, 1985, which is the date of the decision of the court of appeals upon rehearing (App. M, pg. 34a). The initial decision of the court of appeals was entered on November 21, 1984 (App. L, pg. 30a).

TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS

The Labor-Management Relations Act, 1947 ("LMRA")

29 U.S.C. Sec. 185(a). SUITS BY AND AGAINST LABOR ORGANIZATIONS. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA")

29 U.S.C. Sec. 411(a)(4). PROTECTION OF THE RIGHT TO SUE. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

29 U.S.C. Sec. 411(b). Any provision of the constitution or bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. Sec. 412. CIVIL ACTION FOR INFRINGEMENT OF RIGHTS; JURISDICTION. Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. Sec. 413. RETENTION OF EXISTING RIGHTS. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

29 U.S.C. Sec. 415. INFORMATION TO MEMBERS OF PROVISIONS OF CHAPTER. Every labor organization shall inform its members concerning the provisions of this chapter.

42 U.S.C. Sec. 1985 CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS.

(2) OBSTRUCTING JUSTICE: . . .

. . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES.

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

28 U.S.C. Sec. 453 OATHS OF JUSTICES AND JUDGES.

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ..., do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..... according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States, So help me God."

28 U.S.C. Sec. 1337(a)

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: . . . .

28 U.S.C. Sec. 1343(4)

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

18 U.S.C. Sec. 241 CONSPIRACY AGAINST RIGHTS OF CITIZENS.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; . . . ."

18 U.S.C. Sec. 371 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Rules of Civil Procedure

Rule 8(f). CONSTRUCTION OF PLEADINGS. All pleadings shall be so construed as to do substantial justice.

Rule 56(c). SUMMARY JUDGMENT. MOTIONS AND PROCEEDINGS THEREON.

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. . . .

Rule 60. RELIEF FROM JUDGMENT OR ORDER.

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

Illinois Revised Statutes, Chapter 110

Sec. 13-215. FRAUDULENT CONCEALMENT. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he or she has such a cause of action, and not afterwards.

United States Constitution

ARTICLE II, SECTION IV.

> The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors.

ARTICLE III, SECTION I.

> . . . The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, ...

AMENDMENT V.

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . . .

AMENDMENT VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ...

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STATEMENT OF THE CASE

I. Jurisdiction In The Court Below.

The federal district court had jurisdiction in the first instance because plaintiff's complaint pleads federal question claims (a) under LMRA, 29 U.S.C. Sec. 185 and under 28 U.S.C. Sec. 1337 for the employer breach of contract/union unfair representation of grievance claims, (b) under LMRDA, 29 U.S.C. Sec. 412 for the

union violations of LMRDA Secs. 411-415, and (c) under 28 U.S.C. Sec. 1343(4) and 42 U.S.C. Sec. 1985(2)(3) for the claims of deprivation of plaintiff's civil rights by both defendants.

II. Nature Of Each Independent Claim In The Complaint.

This case has been litigated at the pleadings stage since it was filed. There has never been discovery or trial. The questions now before the Court are pleadings stage issues. All the questions ever raised in this suit can be summed up into one: does plaintiff's complaint plead even one single meritorious, timely filed claim on which he is now entitled to go on trial?

The lower courts have just said "no." In order for the Supureme Court to decide if they answered the question honestly and accurately, the Court must understand that the complaint does in fact plead all of the following independent claims. The lower courts would not even acknowledge the existence of most of these claims, although they were repeatedly asked to do so and never gave any excuse for not doing so.

For convenience of reference, plaintiff identifies his various claims by the following five titles:

1) the LMRA Sec. 185 employer breach of contract claims (re. wrongful discipline);
2) the LMRA Sec. 185 union unfair representation of grievance claims (re. said wrongful discipline);

The lower courts acknowledged the above claims, but did not acknowledge the following claims that were also pleaded:

3) the "Lawsuit Bar Provision" claims;

4) the "4-month proviso" claims;

5) the "LMRDA Sec. 415 notice duty" claims.

In addition to pleading these five sets of claims, plaintiff also pleaded a sixth claim that was litigated in "phase 1" of this litigation. In that case, plaintiff sought to be excused from having to exhaust intra-union appeal procedures prior to suit upon the claim that it would be futile in respect to all of the five claims listed above. The court of appeals did not agree that such a prerequisite was necessarily futile with respect to the union, but did agree that it was futile with respect to the employer (App. C). The Supreme Court denied plaintiff's petition for certiorari on this issue (Apps. E, F). Thereafter, plaintiff did exhaust intra-union procedures for the full 4-month statutory period provided for in LMRDA Sec. 411(a)(4). The local and international unions formally denied any relief.

Plaintiff then returned to the district court and moved to vacate the order dismissing the union under Rule 60(b)(5), Fed. R. Civ.Pro. The claims against Chrysler had been held in abeyance pending the intra-union appeal. The district first granted the motion, and then reversed itself and again dismissed the union (Apps. G, H). It held that the unfair representation of grievance claim was insufficient on the pleadings. It held that plaintiff had pleaded *only one other claim* against the union — the above-mentioned *sixth* claim that it would be futile to exhaust intra-union procedures prior to suit (App. H, pg. 20a). The district court completely ignored the existence of the "Lawsuit Bar Provision" claims, the "4-month proviso" claims, and the "LMRDA Sec. 415

notice duty" claims as they are pleaded in the complaint and as plaintiff described them to that court. He presented them there as he presents them below. In its decision (App. H), the district court does mention LMRDA Secs. 411 and 415 and the term "Lawsuit Bar Provision", but when it describes its views of those claims, it cleary confuses them with plaintiff's separate claim that it would be futile to exhaust intra-union procedures on all of his substantive claims. Because the court specifically stated that plaintiff had pleaded only *two* claims, which it defined as the (1) unfair representation claim, and (2) the futility of intra-union appeals claim, and because it had completely ignored the existence of and all the facts in support of (3) the "Lawsuit Bar Provision" claims as actually pleaded, (4) the "4-month proviso" claims as actually pleaded, and (5) the "LMRDA Sec. 415 notice duty" claims as actually pleaded, plaintiff twice asked the district court to reconsider. It denied those motions without comment (Apps. I, J).

In the court of appeals, plaintiff repeatedly explained the independent nature of all said claims and the error in ignoring them. The court of appeals repeatedly ignored the existence of the claims and all of plaintiff's arguments (Apps. I-O).

Plaintiff now hopes the Supreme Court will take the trouble to understand the nature of each separate claim as it is actually pleaded in the complaint and described here. Whether any court will acknowledge the existence of the claims actually pleaded is the central issue of this lawsuit. Whether any judge can arbitrarily ignore valid claims is the central issue of the impeachment petition

which plaintiff is filing in respect to the lower court judges.

A brief description of each separate claim actually pleaded in the complaint is as follows. As the lower courts have acknowledged, the complaint alleges the following claims on behalf of the plaintiff alone.

1. Employer Breach of Contract Claims.

Under LMRA Sec. 185, the complaint alleges that the employer breached plaintiff employee's collective bargaining contract rights by disciplining him without just cause and by discriminating against him on account of race.

2. Union Unfair Representation of Grievance Claims.

Under LMRA, the complaint alleges that the local union violated its duty to fairly represent plaintiff's grievance against the employer for above breach of contract in that the union's conduct in agreeing to the discipline was both arbitrary and discriminatory.

In support of the above claims, plaintiff alleges a very detailed set of facts in his verified complaint, in affidavits, and in other relevant documents. Plaintiff's fact allegations were totally ignored by the courts below. The district court held that plaintiff had pleaded "no facts" that showed that the union was less than diligent in its efforts (App. H, pg. 23a). The court therefore granted the union a summary judgment on the merits on the pleadings on the unfair representation claim. Plaintiff appealed this finding, but the court of appeals made no ruling on it. Instead, the court of appeals affirmed a summary judgment on the pleadings for both defendants on the above

claims on the sole ground that they were barred by retroactive application of the 6-month limitation period newly established by this Court for LMRA Sec. 185 claims (App. L). Plaintiff is appealing that court of appeals decision herein.

However, plaintiff feels he must give this Court some inkling of the facts he alleged in support of the above claims which were ignored by the lower courts. Otherwise this Court might be prejudiced against him if it sees him as the brawler depicted in the district court opinion. The district court adopted the defendants' allegations that plaintiff had been "fighting on company property" with another employee. The court found this to be a serious violation of company rules, for which reason the union's agreement to the disciplinary suspension of plaintiff was not held to the unfair representation (App. H).

Plaintiff argued that the district court had violated federal pleading rules in adopting the defendants' allegations, and in refusing to adopt the following fact allegations of plaintiff. In his verified complaint, plaintiff swears that he was the victim of a criminal attack and was not in a voluntary "fight." There is no sworn or unsworn statement to the contrary by any witness or by the aggressor. Plaintiff himself reported the attack to his employer and to the police. The aggressor was arrested by the police and convicted of criminal battery in state court. That decision is attached to the complaint.

After a joint employer-union investigation of plaintiff's report of the attack, both employees were fired for "fighting on company property." Plaintiff requested the union to file a grievance, which it did, and it filed one as well for the aggressor. At a grievance settlement

hearing from which plaintiff was excluded, the union agreed to settle for identical disciplinary penalties for each employee (two week suspensions). Plaintiff immediately objected when he learned of the terms, and requested the union to appeal to a higher stage of the grievance appeal procedure. The union refused, and after five days the settlement became unappealable under the terms of the contract. A civil suit then became the only remedy against Chrysler.

Subsequently, the union officer who handled the settlement made the following admissions: (1) both the employer and the union knew that plaintiff claimed to be the victim of a criminal attack because he told them so in their joint investigation prior to the settlement, (2) the aggressor never denied the criminal attack or gave any reason for it when they questioned him prior to the settlement, (3) they knew that sufficient grounds had been found by the police to arrest, the district attorney to prosecute. and the court to bind the aggressor over for trial, (4) plaintiff had requested the union to file his grievance on the grounds that he had been the victim of a criminal attack, but the union did not do so, nor did it so argue on his behalf at the settlement hearing from which he was excluded, (5) the union refused to present plaintiff as a crime victim on the basis of the "union principle" that its function was to save the jobs of both its members rather than present plaintiff's grievance on its own merits. It felt it could not save the aggressor's job if it argued that plaintiff had been the victim of a crime rather than a participant in a mutually voluntary "fight."

On the basis of the above facts, plaintiff argued in the courts below that the union's representation of his

grievance was illegally "arbitrary" under the rule of *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The district court repeatedly refused to adopt or acknowledge these pleaded facts, or give any reason for not doing so. Instead, it held to its conclusion that plaintiff had pleaded "no facts" upon which a jury could reasonably find that the union was less than diligent in plaintiff's behalf.

For the sake of brevity, plaintiff will not reiterate here another equally specific set of facts which showed a "discriminatory" motive for the union's admitted refusal to present his grievance on its own merits. The above facts should be sufficient to show that the district court improperly dismissed the unfair representation claim as being without merit on the pleadings. If it is not "arbitrary" for a union to refuse to distinguish between a crime victim and a criminal aggressor in the imposition of penalites, then the courts are simply not operating at a rational level.

In addition to the above LMRA Sec. 185 claims, the complaint specifically alleges the following independent claims on behalf of plaintiff and a class of all persons similarly situated. The lower courts do not acknowledge the existence of any of these claims.

3. The "Lawsuit Bar Provision" Claims.

Section 38 of the UAW-Chrysler national collective bargaining contract, on its face and by Chrysler's own definition and use in this case, absolutely prohibits plaintiff and every other employee under the contract from ever filing a LMRA Sec. 185 suit against Chrysler for breach of the employee's contract rights. For convenience of reference, plaintiff has designated Section 38 as the

"Lawsuit Bar Provision" on the basis of its language and purpose.

The complaint alleges that as an absolute bar on LMRA Sec. 185 suits, the "Lawsuit Bar Provision" (a) constitutes an illegal deprivation of civil rights, (b) constitutes a violation of LMRA Sec. 185 itself, (c) constitutes common law fraud, (d) constitutes a violation of the union's duty of fair representation, (e) constitutes a violation of the union's duty under LMRDA Sec. 415 to inform its members that by reason of LMRDA Sec. 411(a)(4), it cannot so limit their right to sue.

The complaint asks for declaratory and injunctive relief, and for monetary damages.

The "Lawsuit Bar Provision" reads as follows:

> "(38) LAWSUITS. . . . No employee or former employee shall have any right of action under this Agreement on the basis of or by reason of any claim that the Union or any Union officer or representative has acted or failed to act relative to presentation, prosecution or settlement of any grievance or other matter as to which the Union or any Union representative has authority or discretion to act or not to act under the terms of this Agreement."

Chrysler asserted this provision as an affirmative defense and absolute bar to plaintiff's LMRA Sec. 185 claim for breach of contract (re. wrongful discipline), even assuming:

(a) Chrysler breach of contract;

(b) UAW unfair representation of grievance thereover;

(c) no further collective bargaining contract remedy;

(d) no intra-union remedy against Chrysler.

It is a fact that nowhere in the record of this case have Chrysler or the UAW denied or modified the interpretation Chrysler gave to this clause as an absolute bar to LMRA Sec. 185 suits.

It is a fact that this clause is not in any way part of the intra-union appeal provisions in the union constitution. It has nothing to do with the question of whether or not exhaustion of intra-union procedures is to be a prerequisite to a LMRA Sec. 185 suit. It is simply an absolute bar to LMRA Sec. 185 suits, by Chrysler's own admission.

Plaintiff alleges that he was defrauded by the "Lawsuit Bar Provision", and that it caused him to forgo filing the suit until he discovered the fraud.

The courts below repeatedly ignored all these facts and the existence of the "Lawsuit Bar Provision" claims as they are actually pleaded (Apps. G-O).

4. The "4-Month Proviso" Claims.

The complaint specifically alleges various violations by the union defendants of the "4-month proviso" of LMRDA Sec. 411(a)(4). UAW Constitutional Article 33, Section 13 is the primary item of documentary evidence alleged to show a violation of the "4-month proviso." It reads:

> "Section 13. It shall be the duty of any member or subordinate body who feels aggrieved by any action, decision, or penalty imposed upon him or it, to exhaust his or its remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress."

It is a fact that no other UAW constitutional article or bylaw or any other item of evidence in the record imposes any 4-month restriction on the unlimited exhaustion requirement of Article 33, Section 13.

It is a fact that the UAW has made the following statements and admissions in regard to the union's actual policy and practices under Article 33, Section 13. During plaintiff's intra-union appeal of the "4-month proviso" claim (and all others), on July 24, 1979, UAW General Counsel John Fillion stated on behalf of the UAW that as a matter of official and actual policy and practice:

(a) the UAW always requires every member with any type of complaint to exhaust intra-union procedures for an unlimited time beyond 4 months until all possible appeals have been taken by the member and decided by the UAW;

(b) the UAW officially rejects the idea that LMRDA Sec. 411(a)(4) imposes a 4-month limit on the time a union can require its members to exhaust intra-union procedures;

(c) the UAW demanded that plaintiff Ender in this case in his then pending intra-union appeal exhaust UAW procedures for an unlimited time beyond 4 months, regardless of how many additional months were required.

It is a fact that nowhere in the record has the UAW denied or modified the above statements by UAW General Counsel John Fillion on behalf of the union.

On the basis of the foregoing facts, plaintiff alleges that the UAW has violated the "4-month proviso" of LMRDA Sec. 411(a)(4) in its UAW Constitutional Ar-

ticle 33, Section 13, and in its policy and practices thereunder. The complaint seeks to void said article under LMRDA Sec. 411(b), which provides that any union constitutional provision inconsistent with the "4-month proviso" shall be voided.

The courts below repeatedly ignored all these facts and the existence of the "4-month proviso" claims as they are actually pleaded (Apps. G-O).

5. The "LMRDA Sec. 415 Notice Duty" Claims.

LMRDA Sec. 415 imposes on a union the specific duty to inform its members of the provisions of LMRDA Secs. 411-415. The complaint alleges that the UAW has never complied with this duty to the plaintiff and to the plaintiff class. It seeks an injunction, declaratory relief and monetary damages.

Facts in the pleadings that show a violation of the LMRDA Sec. 415 notice duty are as follows. In the verified complaint, plaintiff swears that the union never informed him of any of the provisions of LMRDA Secs. 411-415. The UAW did not file a counter-affidavit saying that it had informed him, nor did it make any such unsworn statement. It submitted no documentary evidence of any kind showing that it had informed plaintiff, nor did it assert that any such documentary evidence existed.

The only union statements bearing on the question of whether or not it informed plaintiff are the statements of UAW General Counsel John Fillion, cited above in the "4-month proviso" section. In those statements, the union says that, as a matter of regular policy and practice, it never informs its members of the "4-month proviso" be-

cause it rejects the idea that there is any such limitation on the time it can require members to spend exhausting intra-union procedures.

Upon these facts, plaintiff alleged that the union had violated its LMRDA Sec. 415 duty to inform him concerning the provisions of LMRDA Secs. 411-415. Neither the defendants nor the courts below ever cited any facts in the record showing union compliance with Sec. 415.

The courts below repeatedly ignored these facts and the existence of the "LMRDA Sec. 415 notice duty" claims as actually pleaded (Apps. G-0).

III. Course of the Proceedings.

This suit has been litigated at the pleading stage since it was filed in federal district court on April 6, 1973. There has never been discovery or trial. It was filed as a class action, but its propriety as a class action has never been argued or decided. All litigation has been on the questions of (1) whether plaintiff should be required to exhaust intra-union procedures prior to suit, (2) whether the claims are sufficient on the pleadings, and (3) whether the claims are timely filed.

A. Phase 1 of the Litigation: Court Decisions Before Intra-union Procedures Were Exhausted for Four Months.

In the first phase of the litigation from 1973 until 1978, the parties litigated the question of whether plaintiff should have to exhaust intra-union procedures prior to suit. Plaintiff argued that it would be futile. The defendants asserted that intra-union remedies existed equal to any available in court. Upon this assurance, the district court granted summary judgment on the pleadings

to both the employer and the union on the sole ground that plaintiff had not exhausted intra-union procedures (App. A).

The court of appeals at first affirmed (App. B), then reversed in part (App. C), and held this position (App. D). That is, on rehearing, the appellate court held that it was futile to seek an intra- union remedy against the employer, but that it was not necessarily futile to seek one against the union.

The Supreme Court without comment denied plaintiff's petition for certiorari and rehearing (Apps. E and F). Thus, plaintiff was required to exhaust intra-union procedures on his claims against the union before proceeding with the civil suit.

It is a fact that nowhere in the "phase 1" decisions does any court rule as a matter of law that it is necessarily legal for the employer and union to have in their collective bargaining contract a clause that absolutely prohibits employees from exercising their LMRA Sec. 185 right to sue. Neither does any court rule as a matter of law that the union has complied with its LMRDA Sec. 415 notice duty, or with the 4-month proviso of LMRDA Sec. 411(a)(4). The decisions merely reject plaintiff's argument that it was necessarily futile to exhaust intra-union appeal procedures in respect to these claims.

During 1978 and 1979, plaintiff sought to settle the suit and also exhausted intra-union procedures for the full 4-month period of LMRDA Sec. 411(a)(4). The defendants refused to settle, and the local and international unions in written decisions denied all relief. In its decision, the International Executive Board for the

international union admitted, inter alia: (1) that no intra-union remedy against an employer was available, (2) no intra-union remedy was available to void the "Lawsuit Bar Provision" in the collective bargaining contract, and (3) no intra-union remedy was available to void a UAW constitutional provision that violated the "4-month proviso" except by appeal to a constitutional convention which met every two years. These admissions should be compared with the defendants' prior statements to the courts that intra-union remedies existed that were equal to any available in court.

B. Phase 2 of the Litigation: Court Decisions After Intra-union Procedures Were Exhausted for Four Months.

In 1979, after exhausting intra-union procedures without receiving a remedy, plaintiff returned to the district court and sought to have the union reinstated as a defendant. The suit against Chrysler had been held in abeyance pending the intra-union appeal. Specifically, he sought to have the order dismissing the union vacated under Rule 60(b)(5) of the Federal Rules of Civil Procedure.

The district court first granted this motion and vacated the order dismissing the union (App. G). Upon the union's motion, the court then reversed itself (App. H), and held to that decision after plaintiff twice moved for reconsideration (Apps. I, J). The court dismissed the unfair representation claim as insufficient on the pleadings upon the assertion that plaintiff had pleaded "no facts" in support of it. The court ignored the existence of the "Lawsuit Bar Provision" claims, the "4-month proviso" claims, and the "LMRDA Sec. 415 notice duty"

claims. It held that plaintiff's claim that it was futile to exhaust intra-union procedure had been decided against him on its merits in prior decisions.

Plaintiff then sought to appeal this decision, but could not because the outstanding claims against Chrysler meant that the district court decision was not final and ripe for appeal. While this issue was being litigated, this Court decided *DelCostello* v. *International Brotherhood of Teamsters*, ... U.S. ....., 103 S.Ct. 2281 (1983), which established a 6-month limitation period for LMRA Sec. 185 claims. Chrysler thereupon moved in the district court for summary judgment on the pleadings on that ground, and the district court granted the motion because plaintiff had not filed suit within six months of Chrysler's alleged breach of contract (App. K). Plaintiff objected to the retroactive application of the 1983 rule change to his 1973 suit — to no avail.

The Seventh Circuit Court of Appeals denied plaintiff's appeal (App. L). Without further comment, it also denied his petition for rehearing (App. M), and two motions for leave to petition the court en banc (Apps. N, O).

Its decision on appeal does not specifically affirm the district court finding that the unfair representation of grievance claim was insufficient on the pleadings (App. L). Rather, the sole ground given for affirming a summary judgment on the pleadings to both defendants as to the entire case is that the LMRA Sec. 185 claims for breach of contract/unfair representation of grievance are barred by the *DelCostello* 6-month limitation period. The court of appeals repeatedly ignores the "Lawsuit Bar Provision" claims, the "4-month proviso"

claims, and the "LMRDA Sec. 415 notice duty" claims, and gives no reason.

Plaintiff repeatedly brought all of his claims to the attention of the lower court judges, but they continued to ignore them. The order at Appendix O shows that plaintiff finally charged the panel with obstructing justice by ignoring these claims. Because all of the lower court judges have completely ignored most of his claims without stating any reason, and because there is no reason for ignoring them or denying them, plaintiff now petitions this Court for certiorari.

REASONS FOR GRANTING THE WRIT.

If the Supreme Court has been willing to acknowledge the existence of and the nature of the claims actually pleaded in the complaint and described herein, then the reasons for granting certiorari will be readily apparent.

I. The Lower Courts Improperly Ignored the Existence of and Refused to Allow Plaintiff to Go to Trial On (1) the "Lawsuit Bar Provision" Claims, (2) the "4-Month Proviso" Claims, and (3) the "LMRDA Sec. 415 Notice Duty" Claims.

Plaintiff submits that the lower courts have criminally obstructed justice in granting the defendants a summary judgment on the pleadings. The conduct of the lower courts has so far departed from the accepted course of judicial proceedings that the Supreme Court should exercise its power of supervision. The wrongful decisions are necessarily in conflict with the decisions of the Supreme Court and those of other circuits.

Simultaneously with the filing of this petition for the Supreme Court to reverse the wrongful decisions, plaintiff is petitioning the House of Representatives to impeach Seventh Circuit Judges William J. Bauer, Harlington Wood, Jr., and Richard D. Cudahy, and District Judge Stanley J. Roszkowski.

The fundamental nature of their illegal conduct has been dereliction of duty — a willful refusal to act according to the laws which govern judges. In violation of their oaths of office and their duties under the specific federal laws and constitutional provisions described here-

in, the lower court judges have knowingly and repeatedly refused to acknowledge the existence of most of the independent, legally sufficient, timely filed claims pleaded in the complaint. They have repeatedly refused to acknowledge the evidence in the record in support of the claims, or the laws under which the claims are made. They have repeatedly refused to state any grounds for ignoring the various claims, evidence and laws. Without any stated or stateable legal excuse, they have refused to give legal effect to plaintiff's perfectly valid claims. They have thereby denied legal and constitutional rights to plaintiff and to the plaintiff class of some two million persons.

No judge may arbitrarily ignore a meritorious, timely filed claim. No judge can lawfully dismiss a claim on the pleadings unless he can specify some particular legal impediment that bars a plaintiff from taking each independent claim to trial. *Conley* v. *Gibson*, 355 U.S. 41, 45, 48 (1957); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962); *Orphan* v. *Furnco Construction Co.*, 446 F.2d 795, 804 (7th. Cir. 1972); *Duzynski* v. *Nosal*, 324 F.2d 924, 925 (7th Cir., 1963); *Rohler* v. *TRW, Inc.*, 576 F.2d 1260 (7th Cir., 1978); *Loge* v. *United States*, 662 F.2d 1268, 1270 (8th Cir., 1981); *New Home Appliance Center, Inc.* v. *Thompson*, 250 F.2d 881 (10th Cir., 1957).

A judge who knowingly ignores a valid claim violates a host of constitutional articles and federal statutes and laws, including: (1) the judicial oath at 28 U.S.C. Sec. 453, (2) the pleading rules in Fed.R.Civ.Pro., Rules 8(f) and 56(c) and the accepted judicial construction of said rules, (3) 18 U.S.C. Sec. 241, Conspiracy against rights of citizens, (4) 18 U.S.C. Sec. 371, Conspiracy to commit offense or to defraud the United States, (5) 42 U.S.C.

Sec. 1985(2) and (3). Obstructing justice, and depriving persons of rights or privileges, (6) Constitution, Amendment V, deprivation of rights without due process of law, (7) Constitution, Amendment VII, deprivation of right to a jury trial, (8) Constitution, Article II, Section IV, high crimes and misdemeanors, and (9) Constitution, Article III, Section I, requirement of good behavior during tenure in office.

A judge who knowingly ignores a valid claim thereby deprives a citizen of his legal and constitutional rights. Grounds for impeachment include violation of the constitutional rights of citizens, and any violation of the oath of office to impartially perform the duties of office. Articles I and II, Resolution Impeaching Richard M. Nixon, President of the United States, voted by the Judiciary Committee of the House of Representatives, July 27 and 29, 1974.

A sitting federal judge may be indicted and convicted for criminal acts involving the exercise of his judicial authority. Impeachment is not a prerequisite. *United States* v. *Hastings,* 681 F.2d 706 (5th Cir., 1982); *United States* v. *Claiborne,* 727 F.2d 842 (9th Cir., 1984); *United States* v. *Issacs,* 493 F.2d 1124 (7th Cir., 1974).

The judges below knowingly and repeatedly ignored the existence of (1) the "Lawsuit Bar Provision' claims, (2) the "4-month proviso" claims, and (3) the "LMRDA Sec. 415 notice duty" claims. They would not and could not specify any legal grounds for granting the defendants a summary judgment on the pleadings on these claims.

There can be no question that the claims are legally sufficient and timely filed. That is:

The "Lawsuit Bar Provision" in the UAW-Chrysler collective bargaining contract absolutely prohibits an employee from filing a LMRA Sec. 185 suit against Chrysler for breach of contract. Chrysler itself has so stated in the record.

However, this is clearly contrary to federal law. At all times material, the law has been that an employee has a statutory right to file such a LMRA Sec. 185 claim. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Clayton* v. *Automobile Workers*, 451 U.S. 679 (1981).

No provision of a collective bargaining contract or other private contract can define, limit, deny or in any way violate the rights conferred on an employee by a federal statute. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 203, 204 (1944); *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922); *Navaroo* v. *Gannon*, 385 F.2d 512, 516 (2nd Cir., 1967).

A deprivation of statutory rights provided by labor laws is a violation of a citizen's federal civil rights, and is actionable as a civil rights claim under 28 U.S.C. Sec. 1343(4) and 42 U.S.C. Sec. 1985(2), (3). *Brett* v. *Sohio Const. Co.*, 518 F. Supp. 698, 705 (D. Alaska, 1981); *United Electrical, R. & M. Workers* v. *Baldwin*, 67 F. Supp. 235, 239 (D. Conn. 1946); *Birnbaum* v. *Trussell*, 347 F.2d 86 (2nd. Cir., 1965); *Common Cause* v. *Democratic National Committee*, 333 F. Supp. 803, 808 (D. D.C., 1971).

The "Lawsuit Bar Provision" deprives plaintiff and plaintiff class of their constitutional right to due process and jury trial. A deprivation of a constitutional right gives rise to a civil rights claim. *Gordon* v. *City of Warren*, 579 F.2d 386 (6th Cir., 1978).

A civil rights claim filed in federal court in Illinois is subject to a 5-year statute of limitations. *Perkins* v. *Hendrickson Mfg. Co.*, 612 F.2d 469 (7th Cir., 1979). There is no question that this suit was filed within two years.

The "Lawsuit Bar Provision" not only gives rise to civil rights claims, but also to common law fraud claims. LMRDA Sec. 413 preserves to plaintiff and plaintiff class the right to bring fraud claims. In Illinois, the statute of limitations for fraud runs for 5 years after discovery of the fraud. *Ill. Rev. Stats.*, Ch. 110, Sec. 13-215.

The "Lawsuit Bar Provision" also gives rise to causes of action under LMRDA Secs. 411(a)(4) and 415. Under Sec. 411(a)(4), the union is prohibited from "limiting" its members' right to sue the union or any other party, such as the employer. Under Sec. 415, the union must inform its members of said provision of Sec. 411(a)(4) to the effect that it cannot limit their right to sue. In violation of these statutes, the union and the employer jointly imposed the "Lawsuit Bar Provision" on the plaintiff and class. Its statement to the employees is that they are absolutely prohibited from suing. The violation by the union of its LMRA Sec. 415 duty to inform plaintiff of the existence of a cause of action (for limiting the right to sue) tolls whatever limitation period would otherwise apply. *Smith* v. *Nixon*, 606 F.2d 1183, 1190 (Cir. D.C., 1979); *Williams* v. *Borden, Inc.*, 637 F.2d 731 (10th Cir., 1980). Is there any rational way for a court to hold that the "Lawsuit Bar Provision" does not illegally "limit" a union's member's right to sue? It absolutely prohibits LMRA Sec. 185 suits by Chrysler's own admission.

Not only does the "Lawsuit Bar Provision" give rise to civil rights, fraud and LMRDA claims, but it gives rise to a claim under LMRA Sec. 185 itself, and for a claim that the union has violated its statutory duty of fair representation in negotiating the collective bargaining contract. *Beriault* v. *Super Cargoes & Checkers of I.L. & W.U.*, 501 F.2d 258, 266 (9th Cir., 1974). In *DelCostello*, this Court held that the 6-month limitation period it enunciated was subject to tolling: 103 S.Ct. at 2294. The general federal rule is that claims arising under federal statutes are tolled by fraud. *Briley* v. *State of California*, 564 F.2d 849 (9th Cir., 1977); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir., 1972). The "Lawsuit Bar Provision" is certainly fraudulent; it absolutely denies that the employees have a right to sue for breach of contract.

The "Lawsuit Bar Provision" operates as a continuing deprivation of civil rights, a continuing fraud, a continuing LMRA violation. A statute of limitations does not begin to run on a continuing violation. *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Taylor* v. *Meirick*, 712 F.2d 1112 (7th Cir., 1983); *Allen* v. *Amalgamated Transit Union*, 554 F.2d 876 (8th Cir., 1977).

For all of the above reasons, it is clear that the "Lawsuit Bar Provision" claims are legally sufficient and timely filed, either under the basic statutes of limitations applicable or under established equitable tolling principles. The courts below had no legal excuse for ignoring the claims and giving the defendants a summary judgment on the pleadings as to the entire suit.

As for the "4-month proviso" claims and the "LMRDA Sec. 415 notice duty" claims, the facts given above in

"Statement of the Case" clearly demonstrate that the claims are legally sufficient. The foregoing authorities show that these claims were also timely filed. It is sufficient to cite *Smith* v. *Nixon*, 606 F.2d 1183, 1190 (Cir. D.C., 1979) to show that whatever limitation period applies to LMRDA claims is tolled by the union's violation of it LMRDA Sec. 415 duty to inform plaintiff of the existence of the LMRDA Sec. 411-415 causes of action.

The Supreme Court cannot acknowledge the nature of (1) the "Lawsuit Bar Provision" claims, (2) the "4-month proviso" claims, and (3) the "LMRDA Sec. 415 notice duty" claims and say they are not meritorious and timely filed.

The facts of this case and the relevant law may be summed up as follows.

Chrysler and the UAW have in their collective bargaining contract the "Lawsuit Bar Provision" clause, which on its face and by Chrysler's own admission absolutely prohibits the employee class from filing a LMRA Sec. 185 suit for breach of contract. This cannot possibly be legal.

The UAW, by its own admission, never complies with the "4-month proviso" of LMRDA Sec. 411(a)(4), and always requires members to exhaust intra-union procedures for an unlimited time beyond four months. This cannot possibly be legal.

The UAW, by its own admission, never complies with its LMRDA Sec. 415 duty to inform its members of the "4-month proviso" and other provisions of LMRDA Sec. 411(a)(4). This cannot possibly be legal.

On these pleaded facts, no court can lawfully, rationally or honestly find plaintiff's (1) "Lawsuit Bar Provision" claims, (2) "4-month proviso" claims, and (3) "LMRDA Sec. 415 notice duty" claims to be insufficient on the merits on the pleadings. These claims were timely filed. Under federal law and the Constitution, no court can lawfully ignore these claims as they are pleaded. The courts below have ignored them without any legal excuse. This judicial conduct so far departs from the accepted and legally mandated standards of judicial conduct that the Supreme Court should exercise its power of supervision and grant certiorari.

II. The Lower Courts Improperly Refused to Toll the Limitation Period They Applied to Bar Plaintiff's LMRA Sec. 185 Claims for Employer Breach of Contract/Union Unfair Representation of Grievance.

The lower courts would not acknowledge the existence of the "Lawsuit Bar Provision" claims or the "LMRDA Sec. 415 notice duty" claims either as independent claims or as grounds for tolling the *DelCostello* 6-month limitation period that they applied retroactively to bar the LMRA Sec. 185 claims for employer breach of contract/union unfair representation of grievance (re. wrongful discipline).

For all the reasons described above, it is obvious that the lower court decision was improper. Plaintiff specifically alleged and argued that he was defrauded by the "Lawsuit Bar Provision" and for that reason was delayed in filing his Sec. 185 suit. It is unconscionable that the defendants should be allowed to escape legitimate liability on Sec. 185 claims which they illegally prohibited plaintiff from filing.

It was doubly inequitable for the courts to make the 1983 *Del Costello* rule retroactive for *ten years* to the date this case was filed in 1973. For ten years, plaintiff litigated at great expense and effort in good faith reliance on the prior rule of the Supreme Court in *UAW* v. *Hoosier-Cardinal Corp.*, 383 U.S. 696 (1966). Under its rule applying the most analogous state statute of limitations, no federal court in the country applied a 6-month limitation period to Sec. 185 suits in 1973 when this case was filed. The courts held that analogous periods were tort, statutory penalty, or contract limitation periods. These are 2-year, 5-year and 10-year periods in Illinois. Under the rule of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), it was inequitable to make *DelCostello* retroactive for ten years in all the above described circumstances of this case.

CONCLUSION

If the Supreme Court wonders why the performance of the lower courts was so far from any acceptable judicial standard, it needs only to know that the class action claims are pleaded on behalf of a class of some two million people. If the defendants have done anything wrong, they have done it to a class of some two million people for at least twenty five years. Declaratory and injunctive relief for the entire class cannot be avoided if the true nature of the plaintiff's claims is acknowledged. This may have given the judges a motive to avoid facing up to their duty to decide without fear or favor.

For all the foregoing reasons, a Writ of Certiorari should be issued to review the decision of the Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner.

Dated: APRIL 22, 1985

APPENDIX A

UNITED STATES DISTRICT COURT
Northern District of Illinois
Western Division

September 27, 1976

JOEL D. ENDER,

Plaintiff,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants.

73 C 23 W.D.

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This action is brought by plaintiff alleging: (1) unfair labor practices by defendant Chrysler Corporation in wrongfully discharging him and refusing to grant plaintiff back pay after reinstatement all in violation of the Labor-Management Relations Act § 301, 29 U.S.C. § 185, *as amended*: and (2) breach by defendants United Auto Workers Local 1268 and the International Union of their duty of fair representation in failing to press his grievance for back pay all in violation of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411, 415. Plaintiff seeks over $500,000 in compensatory and punitive damages, $400 of which represents the back pay he was seeking at the time he presented his grievance to his union and employer.

Defendants have moved for dismissal of plaintiff's complaint, as well as for summary judgment, on the ground that plaintiff failed to exhaust intra-union remedies available to him at the time plaintiff presented his grievance and that this failure precludes this action against plaintiff's employer and union. Plaintiff admits his failure to exhaust but argues that there exists genuine issues of fact as to whether or not in this case exhaustion is required. In the opinion of this court, no such issue of material fact exists and summary judgment is in order.

The law in this circuit is clear that, "Where . . . there is no questions as to the adequacy and mandatory nature of intra-union remedies . . . an exhaustion of the remedies is an indispensable prerequisite to the instituions of a civil action against a union." *Newgent* v. *Modine Mfgr. Co.,* 495 F. 2d 919, 927 (7th Cir. 1974). Moreover, as the Seventh Circuit pointed out, in a suit against an employer for breach of the collective bargaining agreement the employer can also raise as a defense the employee's failure to exhaust intra-union remedies when the employee is required to prove breach of the duty of fair representation by the union *before* he can challenge the employer's failure to properly consider his grievance. *Orphan* v. *Furnco Constr. Corp.,* 466 F. 2d 795, 800-01 (7th Cir. 1972). Since in the case at bar plaintiff admits in his pleading that only the union can process his grievance to the employer pursuant to the collective bargaining agreement, under the Supreme Court's ruling in *Vaca* v. *Sipes,* 386 U.S. 191 (1967), such a showing of unfair representation is required prior to establishing a breach of contract by the employer. Therefore, a demonstration of exhaustion of intra-union remedies is required by plaintiff in this case in order to state a claim against either his union or his employer.

As stated previously, plaintiff admits that he has failed to follow the intra-union remedies made available to him

under the International Union's Constitution and By-Laws. However, plaintiff has made numerous arguments as to why exhaustion in this case is not required. None of these arguments persuades the court that exhaustion of intra-union remedies was not required.

First, plaintiff challenges the United Auto Workers, International Union's intra-union remedies on their face as being in violation of 29 U.S.C. §§ 411 and 415. This facial attack is frivolous in light of the Seventh Circuit's recent commendation of these very same procedures. As the court stated:

> [i]t has been judicially recognized that the [UAW] remedies provide "an adequate, fair, and reasonable procedure." *Reid* v. *Auto Works, Local 1093,* 80 L. R. R. M. 2886, 2892 (D. Okla. 1972), aff'd, 479 F. 2d 517 (10th Cir. 1973).

Newgent v. *Modine Mfgr. Co.,* 495 F. 2d 919, 927 (7th Cir. 1974).

Second, plaintiff argues that *as applied,* the intra-union remedies are unfair and inadequate. Most of plaintiff's arguments need little comment. As to plaintiff's contention that the union's failure to inform him of his appeal rights excuses the exhaustion requirement, the court in *Newgent* stated:

> By becoming a member of the Union Nugent was contractually obligated to exhaust union remedies before resorting to a court action. . . . Necessarily implied in this obligation is the duty to become aware of the nature and availability of union remedies. Newgent was not "justified in remaining in ignorance of the provisions governing his own union. . . ."

495 F. 2d at 927-28. Furthermore, plaintiff's contention that "union" intransigence made compliance with intra-union remedies futile is without merit. Plaintiff alleges

that on nine separate occasions he requested that his *local* take action to settle his grievance, and that he was told there was nothing that could be done. Again, as pointed out in *Newgent,* such allegations of a *local's* intransigence is insufficient to excuse failure to exhaust "union" remedies. *Id.* at 928. The plaintiff, however, attempts to show "union" intransigence by alleging that the International was "conspiring" with Chrysler to prevent the resolution of plaintiff's grievance. This allegation is entirely conclusory and no facts are alleged or presented to this court to show that a conspiracy exists between the "International Union" and the other defendants in this cause. Therefore, no genuine issue of material facts exists as to union intransigence. *See Williams* v. *General Foods Corp.,* 492 F. 2d 399, 405 (1974).

The only other argument raised by plaintiff which needs discussion is plaintiff's contention that it would have been futile for plaintiff to exhaust the intra-union remedies since the International Union could not have reinstituted plaintiff's grievance with Chrysler and the International Union could not have granted him full relief. Plaintiff admits, however, that the intraunion remedies did allow for back pay as well as other compensatory damages and that the union did in fact get him reinstated. Plaintiff's argument, however, is promised on the fact that *punitive* damages are being sought and the union is unable to provide them. But, even if this is true, plaintiff's argument is unpersuasive. At the time that plaintiff had a grievance against Chrysler and sought union assistance, plaintiff only sought $400 in back pay after he had been reinstated. There is no question that the union could have granted plaintiff the relief he sought at the time of his grievance. Therefore, it is clear that the union could have given plaintiff full relief. To hold otherwise would mean that exhaustion would never be required

if *ex post* an allegation of punitive damages is made. This simply is not, and indeed should not, be the law.

Thus, as there is no genuine issue of material fact, defendants' motions for summary judgment are granted.

It is so ordered.

/s/ Joel M. Flaum
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 9, 1977

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge*•

No. 76-2232

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 73 C 23

JOEL M. FLAUM, *Judge.*

ORDER

After reading the briefs and hearing oral argument in this case, we are of the opinion that the district court was correct in granting the defendants' motions for summary judgment and we adopt its memorandum opinion.

The judgment of the district court is affirmed.

• The Honorable Robert A. Grant, United States Senior District Judge for the Northern District of Indiana is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 11, 1977

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge*•

No. 76-2232

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellees.

On Petition for Rehearing

ORDER

Subsequent to our decision in the case at bar, another panel of this Court held in *Harrison* v. *Chrysler Corporation*, No. 75-1970 (June 28, 1977), that an employer may raise an intra-union exhaustion defense only in the limited circumstances where in the employer establishes "that an intraunion appeal could result in reversal of the union's

• The Honorable Robert A. Grant, United States District Court for the Northern District of Indiana is sitting by designation.

refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement." Because of the clear conflict between our decision in the case at bar and the decision reached in *Harrison*, and because we are now convinced that *Harrison* states the better view, we grant Ender's petition for rehearing, and vacate our prior order in the case at bar. In its place, we enter the following order:

"After reading the briefs and hearing oral argument in this case, we are of the opinion that the district court was correct in granting the defendant union's motion for summary judgment, and we adopt its memorandum opinion as our own on the issue of whether an employee alleging breach of the duty of fair representation is required to exhaust available intraunion remedies prior to bringing suit under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411, 415.

"With respect to the issue of whether an employee must exhaust intraunion remedies prior to bringing suit against an employer under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, however, we find this Court's decision in *Harrison* v. *Chrysler Corp.*, No. 75-1970 (June 28, 1977), controlling. In light of *Harrison*, which was decided subsequent to the district court's decision in the case at bar, we believe that the court's grant of summary judgment on behalf of defendant Chrysler Corporation must be reversed and the case remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED."

No. 76-2232

Ender v. Chrysler

SWYGERT, Circuit Judge, dissenting. I would adhere to our original order and affirm the district court in toto.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 8, 1977

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS LOCAL 1268, and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73-C-23

JOEL M. FLAUM, *Judge.*

On Petition for Rehearing

ORDER

The panel granted this petition for rehearing and issued its order deciding the merits of this appeal on

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Hon. LUTHER M. SWYGERT, *Circuit Judge*•

• The Honorable Luther M. Swygert voted to grant the petition for rehearing *en banc.*

October 11, 1977. A judge in regular active service requested a vote and voted to rehear this appeal *en banc.* A majority of the judges in regular active service, however, voted not to rehear *en banc.*

Accordingly, IT IS ORDERED that this appeal not be reheard *en banc.*

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 21, 1978

Ronald G. Ender, Esq.
286 Sheridan Road
Winnetka, IL 60093

RE: Joel D. Ender
v. Chrysler Corporation, et al.
No. 77- 941

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

Michael Rodak, Jr., Clerk

By

/s/ J. H. Lazowski
Assistant Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 17, 1978

Ronald G. Ender, Esq.
286 Sheridan Road
Winnetka, IL 60093

RE: Joel D. Ender
v. Chrysler Corporation, et al.
No. 77- 941

Dear Mr. Ender:

The Court today denied the petition for rehearing in the above-entitled case.

Very truly yours,

Michael Rodak, Jr., Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

February 12, 1981

No. 73 C 23 W.D.

JOEL D. ENDER,

Plaintiff,

vs.

CHRYSLER CORPORATION, et al.,

Defendants.

ORDER

This matter is before the court on plaintiff Joel D. Ender's motions to vacate judgment dismissing UAW defendants and to join additional defendants and file amended complaint.

Plaintiff's second amended complaint alleges: (1) unfair labor practices by defendant Chrysler Corporation ("Chrysler") in wrongfully discharging plaintiff and refusing to grant him back pay after reinstatement, all in violation of Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185; and (2) breach by defendants United Auto Workers Local 1268 and the International Union ("UAW") of their duty of fair representation in failing to press his grievance for back pay, all in violation of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 411, 415.

In a Memorandum Opinion issued September 27, 1976, Judge Joel M. Flaum granted motions for summary judgment by UAW and Chrysler on the ground that plaintiff failed to exhaust intra-union remedies available to him

at the time plaintiff presented his grievance and that such failure precluded plaintiff's action against his employer Chrysler and the Union. On appeal from Judge Flaum's final order, the Seventh Circuit affirmed the decision with respect to defendant UAW and reversed and remanded with respect to the grant of summary judgment on behalf of defendant Chrysler. Plaintiff's Petition for Writ of Certiorari was denied by the United States Supreme Court.

Plaintiff's first motion seeks to vacate the judgment dismissing UAW defendants. Plaintiff claims that it has now exhausted UAW intra-union procedures for the 4-month maximum period established by LMRDA, 29 U.S.C. § 411(a)(4), and that no remedy of any kind was provided by UAW. The 4-month period expired on July 31, 1979. Plaintiff argues that the court has proper grounds under Rule 60(b)(5), Federal Rules of Civil Procedure ("F.R.Civ.P."), to rejoin UAW in that the judgment in question is one of prospective effect and it is no longer equitable for that judgment to have prospective application.

Defendant UAW argues that affirmance by the Seventh Circuit of the District Court's decision in this case amounts to a disposal on the merits of plaintiff's claims against UAW. It is UAW's position that the affirmed summary judgment terminated litigation between plaintiff and the union over the legal effect of events that occurred in 1971.

Rule 60(b)(5) provides in pertinent part:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; . . . .

Defendant cites *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), which defines the term "prospective" as follows:

> The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

286 U.S. at 114.

This court finds that Rule 60(b)(5) is properly invoked by plaintiff in this case and that the decision of the Seventh Circuit with respect to defendant UAW clearly was intended to have "prospective" effect as that term has been defined by the Supreme Court. In an unpublished order dated October 11, 1977, the Seventh Circuit adopted as its own the district court's holding that an employee alleging breach of duty of fair representation by his union is required to exhaust available intra-union remedies *prior to* bringing suit under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411, 415. *Joel D. Ender* v. *Chrysler Corporation, et al.*, No. 76-2232 (7th Cir. 1977). This court understands that decision to imply that, once such intra-union remedies have been exhausted, such a suit may properly be brought.

Accordingly, plaintiff's motion to vacate judgment dismissing UAW defendants is granted.

Plaintiff's second motion seeks to join General Motors, Ford, and three UAW officers as defendants and to amend the complaint accordingly. Plaintiff claims that the Lawsuit Bar Provision in the UAW's collective bargaining contract, which plaintiff is challenging in this lawsuit, is common to the contracts of General Motors and Ford, as well as Chrysler, and, consequently, indicates a conspiracy to defraud all UAW members in the same way. Although plaintiff alleges that all counts and claims in the proposed amended complaint are pleaded in his individual name and right against all defendants, it is apparent to the court that plaintiff now contemplates a class action on behalf of all UAW members.

The court holds that the proposed joinder of additional defendants and the filing of an amended complaint is wholly inappropriate at this time. As so aptly pointed out by defendant Chrysler, plaintiff voluntarily resigned from employment with Chrysler and terminated his union membership in 1971. This lawsuit was filed almost two years later. While plaintiff is entitled to have his claims against the named defendants adjudicated, his arguments for joinder of additional defendants as "co-conspirators" are totally unpersuasive.

Accordingly, it is ordered that plaintiff's motion to vacate judgment dismissing UAW defendants be and the same is hereby granted; plaintiff's motion to join additional defendants and file amended complaint is hereby denied.

ENTER:

/s/ Stanley J. Roszkowski, Judge
United States District Court

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

December 2, 1981

No. 73 C 23 W.D.

JOEL D. ENDER,

Plaintiff,

vs.

CHRYSLER CORPORATION, UNITED AUTO WORKERS, LOCAL 1268, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants.

ORDER

Before the court is a motion by defendants, United Auto Workers Local 1268 and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), to reconsider this court's order of February 12, 1981 granting plaintiff's motion to vacate the judgment dismissing the UAW defendants. For the reasons herein stated, this motion is granted.[1]

The events leading to the instant controversy began in April, 1971. At that time, plaintiff was employed by defendant Chrysler Corporation ("Chrysler") at its automobile assembly plant in Belvidere, Illinois. At the same time, plaintiff was a member of the UAW, International and its Local 1268.

[1] In view of our ruling on defendants' motion, the Request for Admissions issued by plaintiff to the UAW defendants is rendered moot.

Plaintiff was an assembly line worker. The next worker down the assembly line from plaintiff was an individual named David Armstrong. On April 6, 1971, plaintiff and Armstrong engaged in two fights. After an investigation of the incidents by Chrysler representatives, Chrysler discharged both participants in the fights. The basis of the discharges was fighting on company property.[2]

The UAW subsequently filed grievances on behalf of both plaintiff and Armstrong, seeking their reinstatement with full seniority and back pay. At that time, Chrysler refused reinstatement. The UAW thereafter negotiated a compromise with Chrysler, through which both plaintiff and Armstrong would be reinstated and receive full seniority but would not receive two weeks back pay. Plaintiff was advised of this compromise one week before the settlement of his grievance and was further informed that the settlement, once entered, would be final. On May 23, 1971, at a meeting to effect his reinstatement, plaintiff signed the settlement agreement, indicating his concurrence with it.

On August 13, 1971, plaintiff voluntarily left Chrysler and the UAW. Approximately two years later, in August 1973, plaintiff sought to partially repudiate the settlement agreement by demanding his back pay, which totalled $394.33. After again being advised by UAW officials that the settlement of a grievance is final, plaintiff filed the instant suit. Plaintiff made no attempt at that time to exhaust the intra-union appeals procedures provided for in the UAW Constitution.

Plaintiff's original complaint asserted a cause of action based upon breach of contract by Chrysler and breach of the duty of fair representation by the UAW. Defendants filed a motion to dismiss, asserting plaintiff's failure to exhaust intra-union remedies. Plaintiff thereupon filed an amended complaint in which he asserted a

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[2] Fighting on company property has been described by defendants as a serious offense.

cause of action against the UAW purportedly based upon defendants' assertion of the exhaustion defense. In essence, plaintiff asserted that the exhaustion requirement, which he termed the "Law Suit Bar" provision, violates the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 411, 415.

Plaintiff thereafter filed a second amended complaint, which alleges: (1) unfair labor practices by defendant Chrysler in wrongfully discharging plaintiff and refusing to grant him back pay after reinstatement, all in violation of Section 301 of the Labor-Management Relations Act as amended, 29 U.S.C. § 185; and (2) breach by the UAW defendants of their duty of fair representation in violation of the LMRDA, 29 U.S.C. §§ 411, 415. Plaintiff further reasserts the claimed illegality of the intra-union exhaustion requirement and seeks $500,000 in compensatory and punitive damages.

In a Memorandum Opinion issued September 27, 1976, Judge Joel M. Flaum granted motions for summary judgment by UAW and Chrysler. His order was based in part on plaintiff's failure to exhaust intra-union remedies available to him at the time plaintiff presented his grievance. The court held that such failure precluded plaintiff's action against his employer Chrysler and the UAW. On appeal from Judge Flaum's final order, the Seventh Circuit affirmed the decision and adopted as its own Judge Flaum's Memorandum Opinion. On Rehearing, in an unpublished order dated October 11, 1977, the Seventh Circuit, while reversing and remanding as to defendant Chrysler, again affirmed as to the UAW defendants and adopted Judge Flaum's opinion. *Joel D. Ender* v. *Chrysler Corporation, et al.*, No. 76-2232 (7th Cir. 1977). Plaintiff's Petition for Writ of Certiorari was denied by the United States Supreme Court.

Plaintiff subsequently claimed that he had exhausted the UAW intra-union procedures for the four month maximum period established by LMRDA, 29 U.S.C. § 411(a)(4), and that no remedy of any kind was provided

by UAW. Plaintiff moved in this court to vacate the judgment dismissing the UAW defendants, arguing that proper grounds existed under Rule 60(b)(5), Federal Rules of Civil Procedure, to rejoin UAW. Plaintiff contended that the judgment in question was one of prospective effect and that it was no longer equitable for that judgment to have prospective application.

This court granted plaintiff's motion to vacate on February 12, 1981. It is to that decision that the UAW's motion for reconsideration is directed.

In its motion for reconsideration, defendant UAW correctly points out that plaintiff asserts basically two separate and independent claims against it. First, plaintiff asserts that the union exhaustion requirement violates the LMRDA, 29 U.S.C. §§ 411(a)(4) and 415. Second, plaintiff asserts that the UAW breached its duty of fair representation. This court's order of February 12, 1980 considered the effect of plaintiff's exhaustion of his intra-union remedies but failed to discuss the merits of plaintiff's claims. Accordingly, we now reconsider that order.

In support of its motion, defendant UAW argues that Judge Flaum's grant of summary judgment constituted a final legal decision with respect to plaintiff's first claim. Specifically, Judge Flaum stated:

> [P]laintiff challenges the [UAW's] intra-union remedies on their face as being in violation of 29 U.S.C. §§ 411 and 415. This facial attack is frivolous in light of the Seventh Circuit's recent commendation of these very same procedures.

Opinion of September 27, 1976, at 4. Judge Flaum went on to cite *Newgent* v. *Modine Manufacturing Co.*, 495 F.2d 919, 927 (7th Cir. 1974), for the proposition that the UAW remedies provide "an adequate, fair, and reasonable procedure."

In opposition, plaintiff argues that the above quoted portion of Judge Flaum's ruling was reversed by the

Seventh Circuit's Order upon Rehearing, wherein the Court stated:

> [W]e are of the opinion that the district court was correct in granting the defendant Union's motion for summary judgment, and we adopt its memorandum opinion as our own on the issue of whether an employee alleging breach of the duty of fair representation is required to exhaust available intraunion remedies prior to bringing suit under the [LMRDA].

Joel D. Ender v. *Chrysler Corp., et al.*, No. 76-2232 (7th Cir. Oct. 11, 1977). Plaintiff contends that this language constitutes a modification of the Seventh Circuit's adoption of Judge Flaum's Memorandum Opinion in its original order.

We agree with the UAW defendants that the Seventh Circuit's Order upon Rehearing differs from its original order only with respect to summary judgment as to Chrysler. We interpret the additional language in the Seventh Circuit's Order upon Rehearing as merely reaffirming its initial adoption of Judge Flaum's opinion.[3] As the UAW defendants aptly point out, a contrary interpretation would require a finding that the Seventh Circuit reversed part of Judge Flaum's decision as to the UAW defendants without any reference whatsoever to such a reversal. Such a determination, in light of the Sev-

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[3] This interpretation is further supported by the fact that the Seventh Circuit's grant of the Petition for Rehearing was based on *Harrison* v. *Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977), which was decided subsequent to the Court's original order in the instant case and which held that an *employer* could not generally assert intraunion exhaustion as a defense.

enth Circuit's repeated adoption of Judge Flaum's opinion, would run contrary to common sense.[4]

Turning to the issue of the UAW's alleged breach of its duty to fairly represent plaintiff, the pleadings and memoranda before the court do not establish sufficient grounds upon which to base such a claim. The standard for finding a breach of a union's duty of fair representation was enunciated in *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967), where the Supreme Court held that, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."

Further, numerous decisions have held that proof of negligence or poor judgment by a union handling a grievance is not sufficient to support an action for unfair representation. *See, e.g., Dwyer* v. *Climatrol Industries, Inc.*, 544 F.2d 307 (7th Cir. 1976); *Cannon* v. *Consolidated Freightways Corp.*, 524 F.2d 290 (7th Cir. 1975). Most recently, the Seventh Circuit has held that:

> [A]n action based on a duty to fairly represent cannot be based solely on some action or omission by the union that results in an employee not receiving a 'fair' hearing on the merits of a grievance. The legal action based on the union's duty to fairly represent might be more properly labeled as an action for the union intentionally causing harm to an employee involved in a grievance proceeding. The 'duty' is not breached and the employee has no remedy

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[4] It is indeed noteworthy on this point that, in the Supreme Court's most recent confrontation with the issue, the facial legality of the intra-union exhaustion requirement has been undisputed. *See Clayton* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, ... U.S. ....., 49 U.S. L.W. 4550 (1981).

without substantial evidence of fraud, deceitful action or dishonest conduct.

Hoffman v. *Lonza, Inc.*, ... F.2d ....., No. 80-2314, Slip Op. at 6-7 (7th Cir. August 31, 1981).

In the instant case, plaintiff asserts an alleged shortcoming in the UAW's performance in that, although plaintiff was reinstated with full seniority, he did not receive $394.33 in back pay. No facts have been pleaded, however, to demonstrate that the UAW's settlement of plaintiff's grievance was in any way "arbitrary, deceitful or in bad faith." Indeed, plaintiff's sole arbitrariness argument is based on the fact that both he and Armstrong were treated equally by the UAW in the grievance proceedings. No facts have ben established to demonstrate that the UAW was less than diligent in its efforts. Based on all the pleadings, and viewing the facts in the light most favorable to plaintiff, there exists no basis upon which this court may find that a justiciable claim for breach of the UAW's duty of fair representation has been established.

Accordingly, it is ordered that defendants' motion to reconsider this court's order of February 12, 1981 be and the same is hereby granted. It is further ordered that our order of February 12, 1981, vacating the judgment dismissing the UAW defendants be and the same is hereby vacated. The judgment dismissing UAW defendants is, consequently, reinstated.

E N T E R:

/s/ Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

APPENDIX I

In The
UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Western Division

June 2, 1982

JOEL D. ENDER, et al.,

Plaintiff

vs.

CHRYSLER CORPORATION, et al.,

Defendants

No. 73 C 23

Minute Order:

Plaintiff's Motion to reconsider this court's order of December 2, 1981 is denied.

/s/ Stanley J. Roszkowski
United States District Judge

APPENDIX J

In The
UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Western Division

July 23, 1982

JOEL D. ENDER,

Plaintiff,

vs.

CHRYSLER CORPORATION, et al.,

Defendants.

No. 73 C 23

Minute Order:

After careful consideration of the parties' memoranda on the motions, the court denies plaintiff's motion for separate findings of fact and law and denies plaintiff's motion for reconsideration of the June 4, 1982 order.

/s/ Stanley J. Roszkowski
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

August 15, 1983

No. 73 C 23 W.D.

JOEL D. ENDER, et al.,

Plaintiff,

vs.

CHRYSLER CORPORATION, et al.,

Defendant.

ORDER

Before the court is the defendant's motion to dismiss plaintiff's wrongful discharge claim brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. For the reasons stated herein, the motion is granted.

On April 6, 1971, the plaintiff and a co-employee were discharged by defendant Chrysler for fighting. Their union subsequently filed grievances on their behalf seeking reinstatement with full seniority and back pay. Through negotiations between Chrysler and the union it was agreed that both employees would be reinstated with full seniority but without full back pay (a loss of approximately two weeks). On May 21, 1971, plaintiff signed a settlement agreement to the effect that said settlement was final.

Approximately two years later, plaintiff filed the present suit. Plaintiff alleges that he was not the agressor in the altercation and that his rights were denied.

Defendant, relying upon the Supreme Court's opinion in *United Parcel Service* v. *Mitchell,* 451 U.S. 56 (1981), 101 S.Ct. 1559, argued that plaintiff's Section 301 claim was barred by the applicable statute of limitations. *Mitchell,* in effect, established a 90-day statute of limitations for Section 301 claims brought in Illinois. *See Davidson* v. *Roadway Express, Inc.,* 650 F.2d 902 (7th Cir. 1981), *cert. denied,* 455 U.S. 947, 102 S.Ct. 1447. It was therefore clear that plaintiffs two year old claim was barred by the 90 days limitation period.

Plaintiff's only response to *Mitchell* was that its holding should not be applied retroactively to his case. Plaintiff argues that this case was filed eight years prior to *Mitchell,* at a time when there was considerable uncertainty about the applicable limitations period. He argues that it would be unjust to apply *Mitchell* retroactively and that such application would be contrary to the principles enunciated in *Chevron Oil Co.* v. *Muson,* 404 U.S. 97, 92 S.Ct. 349 (1971).[1]

The court chose to defer ruling on the motion until the Supreme Court ruled in the *Del Costello* v. *Teamsters* case. *Del Costello* squarely raised the issue of whether the *Mitchell* precedent was to be applied retroactively.

On June 8, 1983, the United States Supreme Court ruled in *Del Costello. See Del Costello* v. *Teamsters,* 103 S.Ct. 2281 (1983). In a rather surprising move, the Court abandoned the *Mitchell* limitation and instead held that the 6-month limitation period found in § 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), should

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[1] *Chevron* established three factors for determining whether a new judicially pronounced statute of limitations should be applied retroactively: 1) whether the ruling established some new principle of law, either by overruling clear past precedent or by deciding a case of first impression; 2) whether retroactive application would be inconsistent with the policies and purposes behind the rule, and 3) whether retroactive application would work a substantial inequity.

apply to both wrongful termination suits and unfair representation suits under Section 301. In light of *Del Costello*, we now consider the motion to dismiss.

It is clear that plaintiff's claim, almost two years old when filed, is barred by the six-month limitation period announced in *Del Costello*. The question becomes again, however, whether the limitations period should be applied retroactively.

The vast majority of decisions, considering the retroactivity issue in light of the Mitchell holding, held that the § 301 limitations period could be applied retroactively. *See e.g. Pitts* v. *Frito-Lay, Inc.*, Nos. 80-1828, 81-1021 (6th Cir. Feb. 24, 1983); *Lawson* v. *Truck Drivers, Chauffeurs & Helpers, Local Union 100*, 698 F.2d 250 (6th Cir. 1983); *Service Emp. Intern. Union Local No. 36, AFL-CIO* v. *Office Center Services*, 670 F.2d 404 (3d Cir. 1982); *Baldridge* v. *Arkansas Best Freight System, Inc.*, 550 F.Supp. 1159 (S.D. Ohio 1982); *Ward* v. *Alside, Inc.*, 550 F.Supp. 1074 (W.D. Ohio 1982); *Edie* v. *Brundage Co.*, 546 F.Supp. 837 (W.D. Mich. 1982); *Lewis* v. *Harbison-Walker Refractories*, 542 F.Supp. 1381 (W.D. Ind. 1982); *Stahlman* v. *Kroger Co.*, 542 F.Supp. 1118 (E.D. Mo. 1982); *Hudson* v. *Teamsters Local Union No. 957*, 536 F.Supp. 1138 (S.D. Ohio 1982); *McCoy* v. *Truck Drivers, Chauffeurs and Helpers Local Union No. 100*, 526 F.Supp. 1256 (S.D. Ohio 1981); *Del Costello* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 524 F.Supp. 721 (D. Md. 1981), *aff'd w/o opin.* 679 F.2d 879 (1982, CA4 Md.), *rev'd* 103 S.Ct. 2281 (1983, U.S.); *Kikos* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 526 F.Supp. 110 (E.D. Mich. 1981).

A smaller minority addressing the same issue have held against retroactive application. *See e.g. Singer* v. *Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981); *Talley* v. *U. S. Postal Service*, 532 F.Supp. 786 (D. Minn.

1982); *Kennard* v. *United Parcel Service,* 531 F.Supp. 1139 (E.D. Mich. 1982).

The policy considerations weighing in favor of and against retroactive application are well set forth in these decisions and will not be repeated here. Further, the policy considerations discussed in the above cited cases apply with equal force to both *Mitchell* (90 days) and now *Del Costello* (6 months), since both decisions made significant refinements (or arguably wholesale changes) in the limitations period to be applied to Section 301 claims.

What this court finds to be dispositive, however, is that the U.S. Supreme Court has twice applied retroactively the limitations period under Section 301. In *Mitchell,* the 90 day holding was applied retroactively by the Court to bar a Section 301 claim. This retroactive application was somewhat persuasive at the time, but not necessarily dispositive because the retroactivity issue was not raised before the Court. But in *Del Costello,* retroactivity was raised and argued before the Court. Aware of the retroactivity issue, the Court nevertheless chose to apply retroactivity its newly announced limitations period to bar the claim in Case No. 81-2408 (*Steelworkers* v. *Flowers*), the companion case consolidated with *Del Costello.* In light of the Supreme Court's retroactive application of the limitations period in face of a direct challenge to the appropriateness of retroactive application, we can reach no conclusion but that the limitations period is to be retroactively applied.

For this reason, the defendant's motion to dismiss is granted and this action is closed.

It is so ordered.

ENTER:

/s/ Stanley J. Roszkowski, Judge
United States District Court

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

(Submitted November 8, 1984)*

November 21, 1984.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 83-2671

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Western Division.

No. 73 C 23

STANLEY J. ROSZKOWSKI, *Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Plaintiff-appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

ORDER

Plaintiff Joel D. Ender brought this suit against his former employer, Chrysler Corporation, claiming a breach of contract, and against his former union local and international (jointly referred to as the "UAW"), claiming breach of duty of fair representation. The district court dismissed Chrysler from the action, finding that the applicable statute of limitations had run. It also refused to vacate an earlier grant of summary judgment in favor of the UAW. Plaintiff appeals from both of these orders. We affirm.

Chrysler discharged plaintiff and a fellow employee on April 9, 1971 for fighting on company property. The UAW filed grievances protesting the discharges and seeking reinstatement with full back-pay and seniority. The grievances were settled, with Chrysler agreeing to reinstate both men with full seniority, but without back-pay. Plaintiff's unpaid back-pay totaled $394.33. He signed the final settlement agreement on May 23, 1971.

Plaintiff voluntarily left Chrysler and the UAW on August 13, 1971 to return to school. On April 6, 1973 he filed this lawsuit. Prior to the filing, plaintiff did not initiate, let alone exhaust, established intra-union procedures for redressing complaints of members. Following considerable motions practice and various amendments to the complaint, the district court granted summary judgment for defendants on October 4, 1976. On appeal, this circuit affirmed, adopting the lower court's opinion. On motion for rehearing, we again affirmed that part of our decision concerning the UAW, but reversed and remanded with respect to the complaint against Chrysler. The Supreme Court denied *certiorari* and plaintiff's subsequent petition for rehearing. On March 28, 1978, plaintiff initiated an intra-union review of his grievance by filing a complaint that the UAW, following a hearing, dismissed as meritless. Although the UAW Constitution provided for additional levels of review, plaintiff did not pursue the matter with the union. In-

stead, he moved under Rule 60(b)(5) to vacate the district court's grant of summary judgment in favor of the UAW. Plaintiff argued that this order, as modified by this court, was intended to be prospective, pending exhaustion of intra-union remedies, and was not a final judgment on the merits. The district court initially vacated the earlier dismissal of the UAW on February 18, 1981, but reinstated the dismissal on December 7, 1981. On June 2, 1982 the court denied plaintiff's motion to reconsider the December order. On July 23, 1983 the court denied plaintiff's motion to reconsider the June order. Following the Supreme Court's decision in *Del Costello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983), the district court dismissed the suit against Chrysler on August 18, 1983. This appeal followed.

In *Del Costello* the Supreme Court held that the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), governs an employee's hybrid suit arising out of an employer's alleged breach of a collective-bargaining agreement and a union's alleged breach of its duty of fair representation in grieving that breach. Plaintiff signed an agreement settling his grievance on May 23, 1971, and he filed this action on April 6, 1973. Nearly two years had passed since the settlement date, and the six-month limitation period had long since expired.[1] The

[1] Plaintiff argues that the six-month limitations period should be tolled for the time he pursued relief through internal union procedures. We agree. But plaintiff initiated this process much too late—not until eight years after he signed the settlement agreement. The filing of this lawsuit may also have tolled the limitations period, at least until plaintiff fully exhausted judicial review of his claim. The statutory period, however, continued to run until the lawsuit was filed. Since plaintiff waited nearly two years before bringing his action, any tolling triggered by the filing comes too late as well.

district court properly dismissed Chrysler because of this delay. Similarly, it did not abuse its discretion in denying plaintiff's Rule 60(b)(5) motion since, regardless of whether the district court's October 4, 1976 order was final or prospective, plaintiff also failed to timely file his complaint against the UAW.[2]

The orders of the district court are

AFFIRMED.

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[2] Plaintiff argues that this court should not retroactively apply *Del Costello*. This circuit, however, has recently held that *Del Costello* should be so applied. *Landahl* v. *PPG Industries, et al.*, slip op., No. 84-1158 (7th Cir. Oct. 23, 1984). *Cf. Ranieri* v. *United Transportation Union*, slip op., No. 83-2563 (7th Cir. Sept. 13, 1984); *Ernst* v. *Indiana Bell Telephone Co.*, 717 F.2d 1936 (7th Cir. 1983), *cert. denied*, ... U.S. ..... (1984); *Metz* v. *Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983); *Storck* v. *International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1984).

APPENDIX M

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 21, 1985

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

No. 83-2671

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 73 C 23

STANLEY J. ROSZKOWSKI, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Plaintiff-Appellant Joel D. Ender, all of the judges on the original panel having voted to deny the same,

It is hereby ordered that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX N

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 13, 1985

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. .....
Hon. .....

No. 83-2671

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 73 C 23

STANLEY J. ROSZKOWSKI, *Judge.*

On consideration of the "MOTION TO RECALL MANDATE" filed herein on February 5, 1985, by counsel for the plaintiff-appellant,

IT IS ORDERED that said motion is DENIED.

APPENDIX O

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 1, 1985

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. .....
Hon. .....

No. 83-2671

JOEL D. ENDER,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

No. 73 C 23

STANLEY J. ROSZKOWSKI, *Judge*.

This matter comes before the court for its consideration upon the "1) MOTION FOR JUDGES WILLIAM J. BAUER, HARLINGTON WOOD, JR., AND RICHARD D. CUDAHY TO DISQUALIFY THEMSELVES FROM DECIDING THESE MOTIONS ON GROUNDS THAT THEY ARE PREJUDICED AGAINST PLAINTIFF BECAUSE OF HIS CHARGES THAT THEY HAVE CRIMINALLY OBSTRUCTED JUSTICE IN THE CASE TO DATE, AND ARE ATTEMPTING A COVER-UP. 2) MOTION TO RECALL MANDATE, AND FOR LEAVE TO FILE A PETITION FOR A REHEARING EN BANC ON THE ORIGINAL APPEAL. 3) MOTION FOR ORAL ARGUMENT ON THESE MOTIONS. 4) MOTION FOR THE COURT EN BANC TO DECIDE THESE MOTIONS" filed herein on February 15, 1985, by counsel for the plaintiff-appellant. On consideration thereof,

IT IS ORDERED that said motions are DENIED.